Section 5: Constitutional Considerations

During my discussions with people from across Ontario, and as I read the letters that were addressed to me and to the Review, I was impressed and touched by the extent to which respondents relied on their understanding of the *Canadian Charter of Rights and Freedoms* (*Charter*) and its role in protecting the rights of Canadians.[177] Participants in the Review, both those with formal legal training and those with none, regardless of their position with respect to the use of arbitration for personal law matters, have clearly embraced the values expressed in the *Charter* and perceive that the *Charter* supports their perspective on the issues at hand. With some notable exceptions, few acknowledged that there are limits to the applicability of the *Charter*, and that, unless the *Charter* applies, none of its provisions can be brought to bear. Therefore, it may be helpful to outline the situations in which the *Charter* applies. Subsequently I will address some of the arguments put forward by some participants regarding *Charter* sections 15(1) and 2(a), 28 and 27. A discussion of the policy implications of the *Charter* applicability and these sections will follow.

Application of the *Charter*

Prior to determining whether a *Charter* right or freedom has been infringed by a course of action, the following question needs to be answered in the affirmative: does the *Charter* apply?

Section 32 of the *Charter* provides as follows:

> **32.** (1) This Charter applies
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> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
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> (b) to the legislature and government of each province in respect of all matters within the authority of each province.[178]

Accordingly, the federal and provincial governments are bound by the *Charter.* Both Parliament and the Legislatures "have lost the power to enact laws that are inconsistent with the *Charter of Rights*."[179] As well, anything that constitutes government action, including legislation and regulation, is subject to the *Charter*. This includes action taken under the common law.[180] Given that no government can authorize actions that are

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[177] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to *The Canada Act 1982* (U.K.), 1982, c.11.
[178] *Canadian Charter of Rights and Freedoms*, s. 32. Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.),* 1982, c.11.
[179] P.W. Hogg, *Constitutional Law of Canada,* (Toronto: Thomson Carswell, 2003) at 752-753.
[180] *RWDSU v. Dolphin Delivery* [1986] 2 S.C.R. 530 at 573; *Dagenais v. CBC* [1994] 3 S.C.R. 835; *Hill v Church of Scientology* [1995] 2 S.C.R. 1130.

contrary to the *Charter*, this has been further interpreted to mean that the *Charter* binds any decision maker who applies the law because a statute gives them the authority to do so. So, state action under statute, under the common law, and through third parties is subject to the *Charter*.

The Supreme Court of Canada has established a test to determine whether there is a sufficient degree of government control of a public body in order for the actions of that body to constitute government action. According to this test, there must be both an institutional and a structural link between a public body and the government in order for the *Charter* to apply. Where a public service is being performed independently of government control the required link is not present and the *Charter* will not apply.[181]

A link is present where the government delegates power to a non-government actor or agency. The *Charter* applies to that delegate where the government has control over the actor or agency. For example, in a case called *Slaight Communications v. Davidson* the Supreme Court determined that an adjudicator's decision was subject to the *Charter,* because the adjudicator was appointed by the Minister of Labour.[182] Another key aspect is that the body exercising authority delegated by government must be entrusted to implement specific government policies in order for the *Charter* to apply. [183]

Conversely, institutions, such as a hospital, a university, or a corporation, which derive their existence and powers from statute, are nonetheless deemed not to be controlled by government, if decisions that guide the day-to-day operations of these organizations are not taken by government. Therefore, in spite of being public institutions, in the case of hospitals and universities, or simply being regulated by statute, in the case of corporations, these entities are not bound by the *Charter*.[184] On the other hand, as mentioned above, if the body is implementing a specific government policy, then *Charter* scrutiny will ensue.[185]

Omissions made by government may also be subject to the *Charter*. The Supreme Court has spoken on this point. In *Vriend v. Alberta*, Delwin Vriend, a gay man living in Alberta, had been fired from his teaching position on the basis of his sexual orientation. When he brought a complaint to the Alberta Human Rights Commission, he found that sexual orientation was not a listed ground upon which to base a complaint in the *Alberta Human Rights Code*, and that he was without recourse against his employer under that statute. The effect of the Supreme Court ruling was that such an omission taking place in the context of government action may be construed as a deliberate choice to exclude and that that choice amounts to an action. As a result the *Charter* applied to the

[181] *McKinney v. University of Guelph* [1990] 3 S.C.R. 229; *Stoffman v. Vancouver General Hospital* [1990] 3 S.C.R. 483.
[182] *Slaight Communications v. Davidson* [1989] 1 S.C.R. 1038 at 1077; Joseph Eliot Magnet, *Constitutional Law of Canada: cases, notes and materials*, 8th ed. vol. 2 (Edmonton: Juriliber, 2001) at 20.
[183] *Eldridge v. British Columbia (A.G.)* [1997] 3 S.C.R. 624.
[184] *McKinney v. University of Guelph* [1990] 3 S.C.R. 229; *Stoffman v. Vancouver General Hospital* [1990] 3 S.C.R. 483; *Lavigne v. OPSEU* [1991] 2 S.C.R. 211.
[185] *Eldridge v. British Columbia (A.G.)* [1997] 3 S.C.R. 624.

situation created by the omission in the statute and the Court remedied this omission by "reading in" the ground of sexual orientation in s.15.[186]

Section 32 of the *Charter* states both the scope and the limit of *Charter* applicability. The *Charter* does not govern relations between private parties. During the Review, the argument was put forward that where the government regulates, the *Charter* must apply; that is, regulation alone constitutes sufficient government involvement automatically to render actions carried out under the legislation public in nature. It is true that government does regulate much of what may be considered "private" action, if we understand "private" action to mean the relationships between non-governmental parties, such as persons, or corporations. Government regulation must comply with the *Charter* on its face; however, unless the action taken under the statute constitutes government action, the *Charter* will not apply.

Some commentators suggested that the government would be carrying out public action where a court enforces an arbitration award made by a privately appointed arbitrator, thereby introducing an element of ambiguity with respect to application of the *Charter* to arbitrations in Ontario. There are no court decisions on this issue, and it is not clear whether a court would find the necessary link between government and a privately appointed arbitrator. Further, while a court might find that a privately appointed arbitrator resolving a private dispute was enforcing a government action, such a finding has not yet been made.

Some participants have also asserted that section 15(1) of the *Charter* is engaged by the arbitration of family law and inheritance, because of the subject matter being treated. Section 15(1) reads as follows:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. [187]

Other commentators have suggested that section 2(a) of the *Charter,* guaranteeing freedom of religion, comes into play with respect to arbitration of family law and inheritance matters under religious principles. According to some respondents, s.2(a) acts to guarantee the right to arbitrate according to the religious principles of choice of the parties to the dispute. Conversely, other participants foresaw a potential limitation on the freedom of religion of individuals seeking arbitration, if the particular form of

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[186] *Vriend v. Alberta* [1998] 1 S.C.R. 493.

[187] *Canadian Charter of Rights and Freedoms*, s. 2(a). Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.), 1982, c.11; Vriend v. Alberta* [1998] 1 S.C.R. 493.
As noted above, sexual orientation was read into s.15 as an analogous ground by the Supreme Court in 1998 in the case of *Vriend v. Alberta*. This Section requires that government legislation must apply equally to all citizens regardless of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability, or sexual orientation.

religious law used by the arbitrator includes strictures with which the parties were not in agreement.

Section 27 was frequently cited by respondents who argued that the requirement not only to permit but to "enhance" the capacity of multicultural communities demands that communities be allowed to use their own form of personal law to resolve disputes. Section 28 was seen by others as an over-riding requirement to ensure that women's equality rights are guaranteed when family and inheritance issues are being determined.

As we have seen, there are a limited number of categories of action in which the *Charter* applies. First, there is government action under a statute. Second, there is government action under the common law. Third, there is government action through a third party who is empowered by government to act. Fourth, there is government omission in the context of government action.

Agreeing to be bound by an arbitrator's decision falls into the category of an action that is private and therefore, in my view, is not subject to *Charter* scrutiny. The action is private because it is a reflection of the parties' relationship and because the authority of the arbitrator flows directly from the parties' agreement to be bound. Arbitrators do not derive their authority from the government through the *Arbitration Act*.

In addition, arbitration is a private action because there is no state compulsion to arbitrate. The existence of the *Arbitration Act* does not force people to arbitrate. One common misconception on the subject of arbitration of family and inheritance matters that I heard during the Review was that the existence of the IICJ, or any other Islamic arbitration service provider, in and of itself, creates a legal obligation for all Muslims in Ontario to avail themselves of these services. This erroneous interpretation may have developed because of the way the service was presented by the IICJ. However, Muslims in Ontario retain, as do all Ontarians, the right to choose the traditional justice system or any alternate to it for the resolution of their disputes. If they choose not to avail themselves of the services of an arbitrator who applies Islamic legal principles, the law does not compel them to do so. An arbitrator's authority simply comes from the consent of the parties, and no exercise of statutory power is involved.[188] In addition, the presence of legislation does not mean that government action is involved to the extent necessary to merit the application of the *Charter*.

The issue is ascertaining at which point the "public" / "private" divide arises. I recognize that the public/private discourse has resonance for feminist legal scholars. However, where people create legal relationships between themselves on their own authority, as legally capable individuals, it seems that a private legal relationship has arisen. Although government has a role in ensuring that the law that applies to the breakdown of that private relationship does not perpetuate gender roles and stereotypes, if the participants choose not to follow that law, and instead make private arrangements, the government is not required to interfere. As a result, in my view, arbitrations of family

[188] P.W. Hogg, *Constitutional Law of Canada, (*Toronto: Thompson Carswell, 2003) at 754.

law and inheritance matters do not fall into any of the categories of government action that may engage the application of the *Charter.*

Some have argued that the *Arbitration Act* offends the *Charter* by not explicitly protecting women, in particular, as well as other vulnerable people, in its provisions. Underpinning this argument is the idea that what the *Charter* requires from a statute is equality of result, and not equality of application of the statute itself. From this perspective, the absence of *Charter* protection constitutes an omission on the part of government. Yet the *Arbitration Act* does not differentiate on any prohibited ground, indeed does not differentiate on any ground whatsoever, except legal incapacity.[189] Therefore no omission exists on which to argue that a particular group of people is being excluded from consideration. In the *Arbitration Act*, no one is named and everyone is given the same rights and protections.

People who have vulnerabilities of all kinds make private contractual arrangements, with or without arbitrators, which are not subject to *Charter* scrutiny. Even though arbitration of family law and inheritance matters may have the potential to affect women in particular, arbitrations remain private agreements about personal disputes.

It is true that the courts may exercise the power of the state in making orders to enforce arbitration decisions, and the power of the state is to be exercised in conformity with the rules of the *Charter*. A court might hold that it has no jurisdiction to enforce an award that would violate the *Charter* rights of any party.

However, this argument presents a number of difficulties. Nothing in the *Charter* requires disputants to resolve their property disputes on a 50/50 basis or that private legal arrangements arrive at an equal result. Nothing in the *Charter* requires an equal result of private bargaining. Parties may choose an apparently unequal result for many reasons and may think a deal fair that outsiders think is unfair. Recent cases at the Supreme Court of Canada reinforce this point.[190] The *Charter* requires that the state give people equal benefit of the law, without discrimination on any prohibited ground,[191] and that all its rights apply to women and men equally.[192] At present, the law gives all parties to arbitrations, women and men alike, the same right to court enforcement of awards. There is no obvious *Charter* ground to invalidate that.

As mentioned earlier the *Charter* also guarantees people freedom of religion,[193] and is to be interpreted so as to enhance the multicultural heritage of Canadians.[194] This

[189] S.O. 1991, c.17, s. 10, online: < http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/91a17_e.htm>.
[190] *N.S. (AG) v. Walsh* [2002] 4 S.C.R. 325; *Miglin v. Miglin* [2003] 1 S.C.R. 303; *Hartshorne v. Hartshorne*, [2004] 1 S.C.R. 550.
[191] *Canadian Charter of Rights and Freedoms*, s. 15(1), Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.), 1982, c.11*.
[192] *Canadian Charter of Rights and Freedoms*, s. 28, Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.), 1982, c.11*.
[193] *Canadian Charter of Rights and Freedoms*, s. 2(a), Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.), 1982, c.11*.

suggests respect for people's choices as long as those choices or the results are not illegal.

Barring Muslims, or any other identifiable group in Ontario, from arbitrating family law and inheritance matters, while others continue to arbitrate according to the principles of their choice, as some commentators have suggested, would raise the issue of whether the government was in violation of the *Charter*. Given that the *Arbitration Act* provides a framework for arbitration for all Ontarians, the government should not exclude a particular group of people on the basis of a prohibited ground.

The Supreme Court of Canada addressed freedom of religion under section 2(a) of the *Charter* in the context of Sunday shop closings. In *R. v. Big M Drug Mart* freedom of religion was defined as follows:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship or practice or by teaching and dissemination.[195]

While this remains an interpretative starting point, section 2(a) requires a complex legal analysis, involving balancing competing rights, and in order fully to achieve the appropriate balance, further study may be required. In addition, freedom of religion has received little attention from our higher courts. The state of the law as it would apply to arbitrations under religious principles is therefore uncertain at best. To make definitive pronouncements on the state of the law in this area is not possible, because it has not yet been determined. The same can be said of sections 28 and 27 of the *Charter,* which are sections of an interpretative nature. There is little jurisprudence upon which to base unequivocal statements as to their precise meaning, and their definition in law remains to be authoritatively ascertained.

During the course of my Review, I heard from many people who work in the field of arbitration and who expressed grave concern about the possibility of losing the option to arbitrate family law matters. Large numbers of Ontarians use arbitration and mediation to settle family law disputes. They do so in order to avoid the high cost of litigation in courts. But they also do so in an attempt to reach agreements they feel more a part of, rather than having a settlement imposed by a court. There is some indication that these types of agreements may be respected by the parties to a somewhat greater extent than is the case with court-imposed settlements.

Understanding that not everyone will choose to resolve legal disputes in the same manner is central to seeing what is at play in this debate. As we have seen above, the *Arbitration Act* provides everyone with the same opportunity to pursue dispute resolution

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[194] *Canadian Charter of Rights and Freedoms*, s. 27, Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.), 1982, c.11*.
[195] *R. v. Big M Drug Mart* [1985] 1 S.C.R. 295 at 336.

outside of the courts. Just because we may disagree with the manner in which this alternative is used by some individuals does not mean we are allowed to deprive them of the right to use it, as long as they using it in an appropriate manner. Therefore, as long as true consent is obtained, each individual should have the right to make decisions for her or himself, even where those decisions are not those the majority of others would make.

Opponents of family law arbitration often point out that there is no way to ascertain true consent: knowing whether true consent exists is an impossibility and therefore the state should ensure that those who may be vulnerable have adequate protections. A number of assumptions underlie this argument. First is the idea that there are some categories of people who, while being legally capable, are nevertheless automatically vulnerable and therefore unable to understand how to make choices for themselves, and, especially, how to make the right choices for themselves. In this view, there is a defined correct choice. Second is the notion that there is no way someone who is fully informed of her rights and obligations would make certain choices, such as arbitration according to religious principles.

People are entitled to make choices that others may perceive not to be correct, as long as they are legally capable of making such choices and the choice is not prohibited by law. In those areas where the state has chosen to allow people to order their lives according to private values, the state has no place enforcing any particular set of values, religious or not. Picking up the theme discussed earlier about the distinction between private and public, in some ways it doesn't matter where that line is drawn. It is enough to know that it exists and to understand that, where it is drawn at any given time, will determine the area in which the state will assert its values and where it will not.

I believe that arbitrations under the *Arbitration Act* are an area where the state should refrain from preventing private parties from making contractual arrangements about a variety of disputes, including family law and inheritance. There is no question that there are serious concerns that should be addressed by strengthening protections for those identified as vulnerable through legislative, regulatory or other means. The primary purpose of the *Charter* is to mediate the relationship between the state and the individual.[196] Where the state and the individual meet, the *Charter*'s presence should be felt. This is because no institution other than the state possesses the wide array of coercive and persuasive instruments the state has at its disposal. The state can enforce its laws through the police who may, in extreme cases, deprive individuals of their liberty for resisting state legislation or regulation. However, statutory authority underpins state action, from legislation to police enforcement.

The relationship between the state and the individual is unlike the consensual legal relationship between two persons. No individual alone can legally require someone to do something they do not want to do, or punish them for failing to do that which they do not want to do. No one can legally force another to do something they do not consent to, without engaging the authority of the state. The state has a monopoly on the legal

[196] Patrick Monahan, *Constitutional Law*, 2nd ed. (Irwin Law Inc., 2002) at 409.

use of coercion, which it may exercise when it is permitted to do so by law, in order to enforce the law. Therefore, limits provided by *Charter* provisions represent the boundaries of state action that we, as a society, have agreed should constrain the actions of government and its institutions. Face to face with the state, the individual is the weaker party. It is the strength of the state that merits restraint in the form of *Charter* scrutiny.

Critics assert that the distinction that allows the private to be dissociated from the public for purposes of applying the *Charter* is artificial. Critics charge that this distinction is inherently biased against the most vulnerable in society, who cannot defend themselves within private relationships where imbalances of power are unchecked. Where these imbalances of power are reinforced by the courts' upholding contracts made by parties of unequal power, a serious problem arises.

While this is a difficulty that must be addressed, we must bear in mind that state coercion is not the same as community compulsion. Absence of state intervention, where communities exert pressure on their members to make certain decisions, does not mean the state has violated any *Charter* rights. The *Charter* places limits on the type of behaviour the state engages in. At the same time, it should limit the scope of state action. The *Charter* is not a permissive instrument that allows the state to act wherever its provisions are violated, regardless of who is responsible for the violation.

It is not clear to me that we should aspire to the level of state intrusion in our lives that is implied by the application of the *Charter* to privately ordered relationships. Of course, in any given area, the government can decide it wants to regulate for the purpose of achieving conformity of conduct in accordance with a given set of principles. However, this in no way diminishes the fact that we accept that there are private spheres in which people should be free to live as they choose without being forced to subscribe to the values of the state. Where this line is drawn is constantly in flux, its location the result of the ongoing dialogue between the government, the public, and the courts.

This is not to say that other forms of coercion do not exist. However, there are limits in the criminal law on private acts of coercion. The single exception is the law of contract. Within the law of contract we allow private individuals, such as people, corporations, and other institutions, to create private law. If this were not a legally acceptable form of relationship, then every exchange would somehow have to come under government scrutiny. Accepting this form of agreement rests on the notion that the parties entering into such an agreement are capable of making such decisions for themselves. State scrutiny of each privately ordered arrangement implies that no one is capable of making decisions on their own behalf. This is a degree of paternalism which I would find intrusive and inappropriate.

Keeping this in mind, it is a valid question to ask whether all people entering into privately ordered arrangements of their personal affairs actually possess a sufficient understanding of the rights available to them, and the obligations they must fulfill, according to Ontario and Canadian law, in order to make decisions that are right for

them. However, that is a question best dealt with, not by the Constitutional law, but by the broader community as represented by the legislature. Indeed, the legislature may well decide that particular groups need protection from specific risks, as it has, for instance, by the enactment of employment standards or consumer protection laws. The *Arbitration Act* does contain protections, and, as a result of the Review, I will be recommending additional safeguards that recognize the values inherent in the *Charter of Rights and Freedoms*. Nonetheless, I do not believe the Constitution prohibits the use of arbitration, faith-based or otherwise, for resolving disputes about family law and inheritance.